defendant has made no profit out of the transaction. I do not see in what way equity can relieve against him.

I find as a fact that there was fraud on the part of the first defendant. I do not think that Soh Ah Meng, now the first defendant's manager, then his cashier, was acting dishonestly when he bought the charge at the auction sale for $50. But I consider that the proprietor of the first defendant firm knew that by a mistake he had obtained a valuable charge for $50. Though the sale was held on the 24th of May, the first defendant did nothing until the 18th of December. Then he did nothing again till June, 1924, when instead of taking a transfer in the ordinary way, he did so by the indirect method of an irrevocable power of attorney. He did not register his transfer until the day he sold the land in March, 1925, under the power of attorney. It appears from the statement of defence that he wishes us to believe that it was Lim Chai who sold the land. It may have been Lim Chai in name, but it was the first defendant in fact. The conclusion I have come to is that the first defendant realised the significance of the mistake from the beginning, was extremely wary in taking advantage of it, and endeavoured to camouflage the part he played in the subsequent proceedings which were necessary to enable him to reap the profit. He put the profit in his own pocket. He did not pretend otherwise, until at the last moment. Soh Ah Meng in the witness box said that credit had been given for the amount. In my opinion this was a deliberate attempt by the first defendant to swindle the plaintiff out of his property by taking advantage of the innocent mistake of the second defendant.

Fraud is not defined. See *Kerr* on *Fraud and Mistake* page 1,

> "All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to."

I am of opinion, therefore, that the plaintiff's claim for equitable relief must fail, but that he is entitled to succeed in his claim for damages for deceit.

The measure of damages is the value of the charge at the date of the sale, less the $50 paid for it. I assess the value of the charge at the principal value plus arrears of interest.

There will be judgment for the plaintiff against the first defendant for $1,450 and interest at 24% on $1,500 from the 7th May, 1920, to the 24th May, 1923, and costs.

The claim against the second defendant will be dismissed with costs.

The amount of the judgment is to be set off against the decree in Suit No. 440 of 1922.

[ORIGINAL CIVIL JURISDICTION]

ELPHINSTONE, C.J.

November 27, 1930.

KHEM SINGH..... Plaintiff

vs.

ANOKH SINGH.....Defendant

[SELANGOR CIVIL SUIT No. 151 of 1930]

Contract Enactment, 1899, Sections 23 and 65—Marriage Brokage—Recovery of money paid.

A marriage brokage agreement is void as having an object opposed to public policy within the meaning of Section 23 of the Contract Enactment; but such an agreement falls within Section 65 of the Contract Enactment and money paid under it can be recovered back by the person who paid it.

The decision in *Srinivasa Ayyar* v. *Sesha Ayyar*, I.L.R. 41 Mad. 197, that a marriage brokage agreement does not fall within Section 65 of the Contract Act dissented from.

The principle that a marriage brokage agreement is illegal applies equally well to Sikhs as to Hindus.

J. M. Lahiri for Plaintiff.

S. M. Sharma for Defendant.

Cur. adv. vult.

The facts appear sufficiently from the judgment of C.J.—

ELPHINSTONE, C.J.—In this suit the plaintiff alleges an agreement by the defendant to give his daughter in marriage to the plaintiff and to fetch her from India to Kuala Lumpur, the plaintiff paying to the defendant the sum of $1,000 for expenses. He says that the defendant failed to bring his daughter and claims a refund of money advanced to the defendant for expenses and also the value of jewellery and cloth entrusted to the defendant as presents for the bride. His total claim is for $977.91. The defendant denies that he agreed to give his daughter in marriage to the plaintiff. He says he has no unmarried daughter, but alleges that he agreed with the plaintiff to arrange a marriage between the plaintiff and the defendant's widowed sister-in-law who lives in India and is the sister and ward of one Bara Singh. The defendant alleges that the plaintiff agreed to pay Rs. 2,000 to Bara Singh the bride's guardian, but failed to do so, and that for this reason the lady refused to leave India.

The defendant also alleges that the plaintiff agreed to pay his expenses and lost pay and in addition the sum of $250 as commission for arranging the marriage. He accordingly counterclaims for those items and also for Rs. 50 advanced to the plaintiff, his total counter-claim being for $339.80.

The main facts are as follows. The plaintiff is a Sikh watchman at the Central Post Office in Kuala Lumpur. The defendant is a Sikh watchman employed by Towkay Loke Wan Yat in Kuala Lumpur. They are both illiterate except that the defendant can sign his name. They first became acquainted in February or March 1928. The agreement relating to the plaintiff's marriage was made early in September, 1928.

The defendant left for India early in February, 1930. But before he left, the plaintiff in part performance of the agreement advanced to the defendant three sums viz. $100 on the 10th September, 1928, $56 (the plaintiff says it was $62.72) on the 5th November, 1928, and $59 (the plaintiff says it was $66.48) on the 2nd or 4th February, 1929 (the exact date being in dispute). The plaintiff maintains that these three sums were part of the $1,000, the defendant that they were part of his $250 commission. The repayment of these three sums to the plaintiff in the event of the defendant failing to arrange the marriage was secured by promissory notes. The 1st dated the 10th September, 1928, was made by the defendant and his son Kartar Singh (the 6th witness) for $100. The 2nd note dated the 5th November 1928 was made by the defendant alone for $62.72. And the 3rd note dated the 4th February, 1929 was made by the defendant alone for $66.48. All three notes were payable one month after date and bore interest at 24 per cent per annum after due date. The defendant says that the difference between the $56 received by him and the $62.72 secured by the promissory note dated the 5th November, 1928 and between the $59 received by him and the $66.48 secured by the promissory note dated the 4th February, 1929 represents 6 months' interest at 2 per cent per month.

The defendant left Kuala Lumpur for India early in February. The exact date is in dispute and has an important bearing on the credibility of the witnesses. The defendant says he left Kuala Lumpur on the 3rd and embarked at Penang on the 4th. The plaintiff says that the defendant did not leave until after the 5th.

The plaintiff says that on the 5th February, before the defendant left for India, he, the plaintiff, gave a feast to the defendant and others at which he the plaintiff paid to the defendant a further sum of $150 for the defendant's travelling expenses and handed to him jewellery and cloth as presents for the bride. The plaintiff says that the invitation to the feast was given on the previous day (the 4th February) at the house of one Hardat Singh (now in India). The plaintiff called as witnesses Sham Singh (the 2nd witness), Jeun Singh (the 3rd witness) and Bachan Singh (the 4th witness), who testified that they were present at the feast, saw the $150, and the jewellery and cloth handed to the defendant, and were told by the defendant that he had agreed to give his daughter in marriage to the plaintiff who was to pay him $1,000. The defendant absolutely denies both his presence at the feast on the 5th February and the invitation thereto on the 4th February. He also denies the receipt of the $150 and the jewellery and cloth. He says he had left Kuala Lumpur on the 3rd and embarked at Penang on the 4th. He called Bishan Singh (the 7th witness) who testified that he met the defendant on the boat which sailed from Penang on the 4th.

The defendant says that before he left for India, Bara Singh had agreed to give his sister in marriage to whomsoever he, the defendant, should approve. The defendant said:—"When I arrived in India, I told Bara Singh of the arrangement with plaintiff" (i.e. as to the $2,000 dowry). "Bara Singh was not quite satisfied. He said he wanted more money but would abide by what I had done." The defendant says that he then wrote to the plaintiff informing him that the guardian wanted Rs. 3,000 but had agreed to accept Rs. 2,000, and that if the whole Rs. 2,000 was not paid, the bride would not come. The plaintiff denies having received this letter.

On the 6th March the plaintiff remitted Rs. 450 to the defendant in India by telegraphic money order the cost being $300.52. The application to the post office for the order was written by the defendant's son Kartar Singh (the 6th witness). On the same day, the 6th March, Kartar Singh made a promissory note for $250 in favour of the plaintiff. Kartar Singh says that the plaintiff only had $250 and borrowed the $50 from him. Kartar Singh says that the promissory note was given as security; that his father the defendant would pay the Rs. 450 to the person for whom it was intended; the plaintiff that it was a separate transaction for money lent by him to Kartar Singh.

On the 9th March the defendant received the Rs. 450 which he paid over to Bara Singh on the 3rd April, his explanation of the delay in payment being that Bara Singh did not live in the same village as the defendant and happened to be away. The defendant produced a receipt from Bara Singh for the Rs. 450.

The defendant also says that he received from the plaintiff the letter dated the 6th March, being the day on which the Rs. 450 was sent from Kuala Lumpur. The body of the letter was written by Kartar Singh. But the plaintiff denies his signature to the letter. The question of the authenticity of this letter is important. The letter exhorts the defendant to bring the bride and her brother, an exhortation which, while meaningless if the bride was the plaintiff's

daughter, would be appropriate if the bride was the sister of Bara Singh.

The plaintiff made no further remittance to India. The defendant arrived back in Kuala Lumpur on the 20th April without bringing the bride, her guardian having refused to let her leave India until the whole of Rs. 2,000 had been paid. The defendant said that the plaintiff was pleased with what he, the defendant, had done, and that at the plaintiff's request he, the defendant, on the 10th September remitted Rs. 50 to Bara Singh. The defendant said:—"plaintiff said he had not got the money" (i.e. the balance of the Rs. 2,000). "The Rs. 50 was sent to keep them firm to their promises. Plaintiff said he would get the money and go to India and marry her there." The defendant, who in cross-examination was asked to produce receipts for the Rs. 50, produced the receipt from the post office which shows that Bara Singh was the payee of the money order, but said:—"I have not been able to find the receipt by Bara Singh—no time to make a thorough search." The plaintiff denies having asked the defendant to remit the Rs. 50 to India.

The defendant said that later on the plaintiff changed his mind, saying that Jeun Singh (the 3rd witness) had promised to find him a bride locally. On the 7th November 1929 the plaintiff wrote to the defendant demanding repayment of the $300.52 describing it as "the amount remitted to you at your request on the 6th March, 1929 to India when you were then in that country." The defendant replied by letter dated the 12th November, 1929 as follows:—

> "I am in receipt of your notice dated the 7th instant demanding $300.32 from me which is an attempt at blackmail. You know perfectly well that you sent me to India to arrange your marriage for which you agreed to spend any sum of money not exceeding $3,000 and you also agreed, in the event of a marriage coming through, to return to me a promissory note for $100 executed in your favour by me and my son, and two other promissory notes for $62 and $66 executed by me alone in your favour as my remuneration. And that I arranged a marriage for you with a daughter of one Bhola Singh of village Dod, Tehsil Bathanda in Patalia State at a cost of Rs. 2,000. You agreed to such marriage and the cost and then you remitted Rs. 450 to me as a part payment. But you played a trick and at the time you remitted the amount you obtained $50 in cash from my son and you also got him to sign a promissory note in your favour for $250.
>
> "Since my return I have informed you about the arrangements regarding your marriage and expenses to which you agreed. But since then you have changed your mind and you are now bent upon blackmail.
>
> "You have been requested to go to the Sikh Temple to have the whole affair thrashed out and settled but you are not agreeable to go to the temple.
>
> "This is, therefore, to notify you that unless, within 7 days from to-day you return me the notes for $100 (executed by me and my son in your favour) and $62 and $66 executed by me alone in your favour and also return the note executed by my son in your favour for $250, and also refund him the sum of $50 and also give up the money order receipt, I and my son will be reluctantly compelled to institute legal proceedings against you for the recovery of the above said and will also have to report the matter to the Controller, Posts and Telegraphs. The promissory notes aforesaid are all void and henceforth no further payments with regard to the interest on the loans will be made.
>
> "Your marriage can take place at any time you may require after you have returned the above said documents and refunded the sum of $50 and also be prepared to spend the balance sum of Rupees one thousand five hundred and fifty, which is to be paid to the relatives of your fiancee."

It will be observed that this letter makes no claim for the balance of the $250 commission, though it does mention the subject of remuneration, or the Rs. 50 alleged to have been remitted to Bara Singh at the plaintiff's request.

On the 2nd December, 1929 the plaintiff filed a plaint in the Magistrate's Court—Civil Suit No. 2161/29 against Kartar Singh claiming judgment on the promissory note dated 6th March, 1929 for $250. On the 6th January, 1930 Kartar Singh filed a statement of defence to the effect that he had executed the promissory note as security for the due payment of the $250 by the defendant in this suit to Bara Singh. On the 25th January, 1930 the plaintiff's suit was dismissed with costs. He appealed to the Supreme Court. On the 25th April, 1930 his appeal was dismissed with costs.

By letter dated the 3rd February, 1930 the defendant's solicitor claimed from the plaintiff $309.00, the items being the same as those in the defendant's counterclaim in this suit, except that the letter made no claim for the balance of the $250 commission.

By letter dated the 5th June, 1930 the defendant reminded the plaintiff of his, the defendant's, letter dated the 12th November, 1929 and threatened proceedings unless the three promissory notes were returned within 7 days. On the 17th March, 1930 the plaintiff filed his plaint in the present suit.

It will be seen that, in addition to the main issue as to the true terms of the contract between the parties as to the plaintiff's marriage, there

are several minor issues on which the parties are at serious variance. An examination of these minor issues will, I think, help me in deciding which party I ought to believe.

* * * * *

[The judgment here goes on to deal with the question of the evidence and the findings of fact on the evidence.—Editor.]

* * * * *

In these circumstances I feel unable to believe the plaintiff's evidence, and I have no hesitation in accepting the defendant's version as substantially true. In my judgment the true agreement was that the defendant should proceed to India and negotiate a marriage between the plaintiff and Bara Singh's sister, and if successful, bring the bride to Kuala Lumpur, the plaintiff paying Rs. 2,000 to Bara Singh, the defendant's expenses and maintenance, and lost pay, and a commission of $250. I also find as facts that the defendant did arrange the marriage, and that his failure to bring the bride to Kuala Lumpur was due to the plaintiff's default in not paying the balance of the Rs. 2,000. I also find as a fact that the plaintiff did request the defendant to remit the Rs. 50 to India. In reaching these conclusions I have not forgotten that the defendant's letter dated 12th November, 1929 (written by a petition writer) did not claim the Rs. 50 or $250 commission, and that his solicitor's letter dated 3rd February, 1930, though it mentions the Rs. 50, did not claim the $250 commission. On the other hand the defendant when giving evidence in Civil Suit 2161 29 did tell the Magistrate about the Rs. 10. On the whole I think the defendant's omission in letter L to claim the $250 commission is not sufficient reason for rejecting his evidence on that point. I also find as fact that the plaintiff remitted the Rs. 450 to the defendant in India for the purpose of it being paid to Bara Singh and that the defendant did pay it to Bara Singh.

It follows that, but for the point of law presently to be mentioned, the plaintiff's suit would fail and the defendant's counterclaim would succeed. But in his final speech in reply, counsel for the plaintiff, for the first time, took the objection that the agreement was a marriage brokage contract and consequently void under section 23 of the Contract Enactment.

There is no doubt that in England a contract by A to pay a sum of money to B in consideration of B arranging a marriage between A and C is void as being against public policy. And this is equally so whether B is a stranger to, or the father or guardian, of C. See *Hall* v. *Potter*, (1695) Show. P.C. 76, reprinted in a note to *Scribblehill* v. *Brett*, 4 Bro. P.C. 144, where B was a stranger to C, and *Duke of Hamilton* v. *Lord Mohun*, 1 P. Wms. 118, where B was the mother of C, and the modern cause of *Hermann* v. *Charlesworth*, (1905) 2 K.B. 123.

This doctrine has been applied in India in several cases. In *Pitamber Ratansi* v. *Jagjivan Hansraj*, I.L.R. 13 Bom. 131, the plaintiff, who was the head of a caste, agreed with the defendant, whose mother had been put out of the caste, in consideration of a sum of money to be paid by the defendant to the plaintiff to procure the admission of the defendant and his brothers to the caste and to get them married to girls belonging to the caste. Scott, J., held that the agreement, so far as it concerned re-admission into caste, was legal. But he observed:—

> "Was this contract, in so far as it promised money payment for the negotiation of a marriage by a third party, immoral and contrary to public policy? In England such a contract would not be enforced at law—*Kean* v. *Potter*, 3 P. Wms. 76; *Story's Equity Jurisprudence*, Sections 260-261. It would be held to be against public policy and public interest as having a tendency to cause matrimony to be contracted as a mere matter of bargain and sale 'a kidnapping into conjugal servitude', as one of the judges expressed it. It was contended that such an argument did not apply in India. The Asura form of marriage, which is legal among the lower castes, is, no doubt, nothing more than the purchase of a wife from her father by the husband. As long as the customs of infant marriages is maintained, mutual affection and choice cannot be the basis of marriage. But I do not think it follows that the English Rule can have no *raison d'etre* in India. Although custom and local law in this country may be defective in the matter of marriage, that is no good reason why an additional evil should be engrafted upon them. I had no proof given me that "marriage brokage" is an established usage in India. Marriage brokers should not be given a legal status such as would enable them to enforce their contracts by law. The tendency of such a decision would be to still further degrade the position of women and to perpetuate the inequality of their relations with the other sex. In my opinion the contract is void under section 23 of the Contract Act, and to this I would add as an additional authority, the following passage from Narada:—'And let the king who desires prosperity repress sinful proceedings which are unauthorised by moral law'; and the Hindu commentator quoted by *Colebrooke* defines 'sinful proceedings' as 'acts not productive of good.' See *Colebrooke's Digest, Sloka*, 27 Vol. II, page 301."

This judgment of Scott, J., was quoted with approval and followed by Jardine, J. in *Dulari* v.

Vallabdas Pragji, I.L.R. 13 Bom. 126 where the person to whom the money was to be paid was the guardian of the girl.

In *Vaithyanatham* v. *Gangarazu*, I.L.R. 17 Mad. 9, an agreement to reward the plaintiff, a Hindu, for selecting a wife for the defendant was held void as being contrary to public policy. Muthusami Iyer, J., after stating the English rule said:—

> "On principle this rule appears to be of general application and not of a special or conventional character. Is there anything then in the usage of this country to preclude its operation? As far as I am aware there is nothing in the usage to the contrary; on the other hand the interference of hirelings in bringing about marriages is regarded with disapproval. It is no doubt true that the Asura form of marriage, which involves a money payment, is valid according to Hindu Law, and it was so held in *Viswanathan* v. *Saminathan*, I.L.R. 13 Mad. 83 that a bond given to secure such payment was valid. But the payment in that case was to be made to the father of the girl for giving her in marriage. Though this form of marriage is disapproved by text writers, yet it is upheld, as it is in accordance with established usage. It is also to be observed that the money received by the father is often applied in part to making jewels for the girl given in marriage and in part to meeting the other expenses of the marriage, and that this mode of applying the payment is also an argument in favour of the usage. But the case is otherwise when hirelings are employed, and their employment tends to as much deceit on parents in India as in England. It is true that there are child-marriages in India, but the prevalence of such marriages appears to me to require, rather than exclude, the operation of the rule designed to prevent the possibility of deceit on parents, as well as on either party to the marriage. In the absence of an established usage to the contrary, I see no good reason why an additional evil should be engrafted on this country by ignoring the rule of public policy and according a legal status to marriage brokers by a supposed analogy to Asura marriage. I would, therefore, rest my decision on two grounds, viz. that the justice of the rule of public policy is open to no question, and that no established usage precludes its application except in the case of a money payment agreed to be made to the father of the girl in the Asura form. I would dismiss this petition."

In *Srinivasa Ayyar* v. *Sesha Ayyar*, I.L.R. 41 Mad. 197, the plaintiff sued to recover Rs. 400 paid to the defendant as consideration for the defendant bringing about a marriage between the defendant's son and the plaintiff's minor sister. The marriage did not take place and the plaintiff sued to recover the Rs. 400 alleging a breach of the agreement by the defendant. The defendant pleaded, and the Court found, that it was the plaintiff and not the defendant who had broken the agreement; so the facts were very similar to those in the present suit. The Court held that the agreement was unlawful and void, and that the plaintiff, notwithstanding his breach of the agreement, could recover the Rs. 400.

In all the above cases the parties were Hindus; but I know of no circumstances which render the principle inapplicable to Sikhs. I am, therefore, of opinion that the agreement between the plaintiff and defendant as found by me is void as having an object opposed to public policy within the meaning of section 23 of the Contract Enactment. I am also of opinion that the agreement between the plaintiff and Bara Singh made through the agency of the defendant that Bara Singh should give his sister in marriage to the plaintiff in consideration of a payment of Rs. 2,000 to Bara Singh is also void. The defendant said:—"The Rs. 2,000 were to be paid to my wife's parents, the bride's relations." I can find no hint in the evidence that any part of the Rs. 2,000 was to be applied for the benefit of the bride. This agreement is, therefore, tainted with marriage brokage and void.

It remains to consider the effect of the illegality on the rights of the parties. As I have already said, the point was only taken by counsel for the plaintiff in his final speech in reply. And he contented himself with suggesting that the contract as stated by the defendant would be void under section 23. He cited no authorities nor did he suggest what were the consequences of the illegality. Nor have I had the advantage of hearing the views of the defendant's counsel on the point. It is, therefore, with reluctance that I feel compelled to give effect to this last minute defence; particularly as the variance between the plaintiff's evidence and his plaint is probably due to his having learnt, since his plaint was filed, that, while the agreement as pleaded is void, yet an agreement to pay the defendant his expenses of bringing his daughter from India would be valid. But the illegality caused by the marriage brokage is a matter of law which is patent from the facts stated in the pleadings and proved. The rule exists—as stated by Lord Harwicke in *Cole* v. *Gibson*, Ves. Sc. 503, 506, "not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation." I am, therefore, bound to take judicial notice of the illegality.

The taint of marriage brokage, in my opinion, invalidates the promissory notes on which the plaintiff sues, as much as any other part of the agreement. The object of the notes was unlawful, viz., to secure that the defendant shall perform

an illegal agreement, and by section 23 of the Contract Act "every agreement of which the object or consideration is unlawful is void." It follows that the plaintiff's claim on all the 3 notes fails.

But the defendant has actually received from the plaintiff the sums of $100, $56, and $59. And I must decide whether the defendant is bound to refund these sums under section 65 of the Contract Enactment. Section 65 reads as follows:—"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The Indian Courts have taken the view that the words discovered to be void limit the operation of the section to cases where a contract is found to be void by reason of some fact not known to the parties at the date of the contract, but subsequently discovered. And accordingly, in *Srinivasa Ayyar* v. *Sesha Ayyar (supra)* the plaintiff's claim to recover the Rs. 400 paid by him as marriage brokage was decided according to English law.

With the greatest respect to the Indian Courts I feel unable to adopt that view. The words "when an agreement is discovered to be void" are general in terms. The section is silent as to when or by whom, or for what reason, the agreement is to be discovered to be void. In my opinion the words "discovered to be void" mean no more than "if found to be void." In the course of this suit the Court has found the agreement sued upon to be void. In this sense the agreement has been discovered to be void, and section 65 seems to be exactly applicable.

I am confirmed in this view by the case of *Harnath Kuar* v. *Inder Singh*, 50 I.A. 69. In that case the plaintiff-appellant sued to recover possession of certain villages bought by her deceased husband from the defendant-respondent, or alternatively, to recover the purchase money. The Judicial Committee held that at the date of the sale the vendor had no more than an interest in expectancy and so had no interest in the village which he was competent to transfer or bind. The sale deed was, therefore void, *ab initio*. In opposing the plaintiff's claim for a refund of the purchase money under section 65, counsel for the defendant-respondent argued as follows:—"The appellant has no rights under section 65 of the Indian Contract Act, 1872. That section does not relate to an agreement which was void in law, as this was, when it was made; it relates only to one which is found to be unenforceable owing to the discovery of some fact; for instance under section 20, by it being discovered that there was a common mistake of fact." The judgment of the Board contains the following passage:—"Before this board the claim has been based on section 65 of the Contract Act. It is therefore provided that when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (a) agreements, (b) contracts. The distinction between them is apparent from section 2; by clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement here was manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated. But later on in their judgment the Board in considering the defence of limitation held that there was a misapprehension as to the rights which the vendor purported to sell, and that the true nature of those rights was not discovered by the plaintiff or her husband until his demand for possession was resisted which was within the period of limitation. The judgment then proceeds:—"It was thus that the agreement was discovered to be void, and the discovery in their Lordships' view was one within the words and the meaning of section 65 of the Contract Act."

It is, I think, clear that the decision of the Board as to the applicability of section 65 was not based on the subsequent discovery of the true nature of the rights sold, and that the Board referred to the discovery not as being essential to the applicability of section 65, but for the purpose of ascertaining the time when the period of limitation commenced to run. But even if the case is not an exact authority for the present suit, it certainly did decide that section 65 applies to an agreement void *ab initio*, and the judgment is not inconsistent with my view that it is immaterial when, or by whom, or for what reason the agreement is discovered to be void. I, therefore, hold that the agreement, having been found by me to be void, has been discovered to be void, and that section 65 applies. It follows that the sums of $100, $56, and $59, being part of the defendant's commission, were advantages received by the defendant which he is bound to restore under section 65, and that the plaintiff is entitled to judgment for these sums. It also

appears that if section 65 does not apply, the plaintiff would be entitled to recover these sums under English law. See *Hermann* v. *Charlesworth*, (1905) 2 K.B. 123, particularly the judgment of Cozens Hardy, L.J., and *Srinivasa Ayyar* v. *Sesha Ayyar (supra)*.

But the Rs. 450 remitted to the defendant in India and by him paid over to Bara Singh is not, in my opinion, an advantage received by the defendant. The defendant, in my view, received this sum as agent of the plaintiff for the express and sole purpose of paying it to Bara Singh. Accordingly the plaintiff's claim for a refund of this sum fails. The plaintiff's claim for the $150 alleged to have been paid to the defendant on the 3rd or 5th February and for the value of the jewellery and cloth also fails, my findings of fact as to these items being adverse to the plaintiff.

As regards the counterclaim, the defendant's claim for the balance of his $250 commission is obviously bad for illegality and fails. So also is his claim for loss of wages which is merely a form of remuneration for the defendant's time expended in furthering the illegal object. There remains his claim for steamer and train fares and cost of maintenance. These are expenses actually incurred, and it must be remembered that the defendant has performed his agreement, viz., to proceed to India and arrange the marriage.

Section 65 appears to be the only section in the enactment dealing with void agreements which have been performed by one of the parties. But this section does not help the defendant as the plaintiff has not received any advantage under the contract from the defendant. The only other section which could possibly apply is section 57 which reads as follows:—"Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain things which are illegal, the first set of promises is a contract, but the second is a void agreement".

Can it be said that the plaintiff and defendant promised, first, to do certain things which are legal, viz., that the defendant should proceed to India and that the plaintiff should pay his expenses, and, secondly under specified circumstances, viz., on his arrival in India, that the defendant should do an illegal thing, viz., arrange the marriage? In my view the agreement proved in this suit cannot be split up in this manner. The agreement to go to India was, in my view, not an independent agreement, but a mere step in the performance of the illegal agreement.

It must, I think, be taken that the Contract Enactment deliberately omits to provide for the recovery of expenditure incurred under a void agreement except in the specific case mentioned in section 65. It follows that the defendant's counterclaim for his steamer and train expenses and maintenance fails. A similar conclusion has been reached in the English Courts. See *King* v. *Burr*, 3 Mer. 693 as explained in *Hermann* v.

The only other item in the counterclaim is the Rs. 50 remitted by the defendant to Bara Singh at the request of the plaintiff. The defendant said that Rs. 50 was sent "to keep them" (i.e. the bride's family) firm to their promise." It was, therefore, within the defendant's knowledge that Rs. 50 was to be used for an unlawful object. It follows that, though the consideration for the loan viz. the promise to repay, was not unlawful, yet the object of the agreement was unlawful, and the agreement is void. The English Courts have adopted the same reasoning. See *Pearce* v. *Brooks*, (1866) L.R. 1 Exch. 213. The defendant's counterclaim for the Rs. 50 accordingly fails.

The result is that the plaintiff gets judgment for $215 on his claim, and the defendant's counterclaim is dismissed. To mark my disapproval of the plaintiff's conduct in giving what I believe to be false evidence and in as much as the plaintiff's success in the suit—such as it is—is due to the proof of facts which he has falsely denied, I shall make no order as to the costs of either the claim or counterclaim. For the same reasons I shall not allow any interest on the $215 recovered by the plaintiff.

Judgment accordingly.

[ORIGINAL CIVIL JURISDICTION]

WILLIAMSON, J.

July 9, 1933.

CHONG GUAT YIN OF SINGAPORE..Plaintiff

vs.

K. A. R. S. T. ARUNASALAM CHETTYAR.....Defendant

[BATU PAHAT CIVIL SUIT No. 17 of 1933]

Johore Courts Enactment—Civil Procedure Code, Section 284—claim for declaration of title—Registrar's Order on Objector's Inquiry—priority of registration.

Under S. 284 of the Civil Procedure Code in force in Johore a party against whom an order under section 281, 282 or 283 is made may institute a suit to establish his right to a property in dispute, notwithstanding that an order was made in objection proceedings relating to the same property.

The provisions of the Land Enactments do not preclude the Court from going behind the registered title of land to enable the Court to enforce trusts or to ascertain what interest a judgment debtor has in lands attached.

ACTION tried before Williamson, J.

The facts sufficiently appear from the Judgment below.

Goho (*Osborne-Jones* with him) for the Plaintiff.

Knowles (*Pillai* with him) for the Defendant.

Cur. ad. Vult.